UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LUCIANNE PAULINO and LATU FANAIKA, on behalf of themselves and all others similarly situated, Plaintiffs, v. CONOPCO, INC., D/B/A UNILEVER, Defendant.	Case No. 14-cv-05145-JG-RML

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

Plaintiffs Lucianne Paulino and Latu Fanaika bring a simple claim based on what they believed was simply a "natural" product: Defendant Conopco, Inc., d/b/a Unilever ("Unilever" or "Defendant") exploits consumers' preference for natural personal care products over products that contain artificial or synthetic ingredients by prominently and uniformly describing its Suave brand products as "Naturals" (the "Products").[1] "Natural" products are indeed what resonate with consumers today, and "Naturals" is one of the most conspicuous words on Defendant's packaging. By representing the Products as "Naturals," Unilever can, and does, charge a price premium for them. Unfortunately for consumers, however, the Products are not actually natural as labeled. Instead, the Products all contain numerous ingredients that are synthetic and artificial. Thus, Unilever's description of the Products as "Naturals" is misleading and deceptive to a reasonable consumer. Unilever's deceptive labels violate New York Gen. Bus. Law § 349 ("GBL § 349"), the California Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750 *et seq*. (the "CLRA"), the Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq*. (the "UCL"), the False Advertising Law, Cal. Bus. & Prof. Code §§ 17500 *et seq*. (the "FAL"), breach an express warranty, and unjustly enrich Defendant.[2]

Unilever does not deny the Products are filled with unnatural, synthetic ingredients. Rather, Unilever argues that consumers should know that it did not mean what it represented and that all personal care products are inherently synthetic. Defendant is wrong. Reasonable consumers believe Defendant's prominent representation that the Products are "Naturals," as many other cosmetic products on the market are natural.[3] Further, reasonable consumers should not be expected to look beyond misleading representations on the front of a label, only to discover the truth from an ingredient list in small print on the back of the packaging. Moreover, whether a reasonable consumer would expect a product described as "Naturals" to be filled with unnatural, synthetic ingredients is a question of fact that the Court need not resolve at this stage. Because Plaintiffs have plausibly alleged that the "Naturals" representation misleads consumers, the Court should deny Unilever's motion. Indeed, Judge Roman recently rejected a similar motion to dismiss brought by Johnson & Johnson with respect to its "Active Naturals" line of cosmetic products. *See Goldemberg v. Johnson & Johnson Consumer Companies, Inc.*, 8 F. Supp. 3d 467 (S.D.N.Y. 2014); *see also Morales v. Unilever U.S., Inc.*, No. 13-2213, 2014 WL 1389613 (E.D. Cal. Apr. 9, 2014) (denying motion to dismiss in significant part in case involving cosmetic product line allegedly mislabeled as "Naturals").

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[1] The "Products" are identified in Defendant's Memorandum ("Def. Mem.") at p. 3 n.1.

[2] Plaintiffs are not pursuing their claims for fraud and negligent misrepresentation at this time.

Unilever argues that the Court should dismiss Plaintiffs' breach of warranty claim based on Plaintiffs' purported failure to give notice of the breach and because it believes that the "Naturals" representation does not constitute a warranty. Defendant, however, was indeed notified of the warranty claim in several ways: by letter dated October 25, 2013;[4] a pre-suit draft complaint (*see* Richman Decl., Ex. 2); and through the parties' extensive discussions relating to the facts at issue in this litigation, which occurred for months prior to the initiation of this action (Richman Decl., ¶ 10). Moreover, notice is not required with respect to a manufacturer who is not the retailer seller of over-the-counter products. Defendant's alternative argument that the "Naturals" representation does not constitute a warranty has been continually rejected by courts addressing the issue in nearly identical factual circumstances from New York to California and should be similarly rejected here.

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[3] *E.g.*, http://www.allnaturalcosmetics.com (last visited Jan. 9, 2015) (advertising "the best cosmetics without synthetics"); http://www.100percentpure.com/pages/faq (last visited Jan. 9, 2015) (stating "100% Pure products are truly 100% pure: no synthetic chemicals, chemical preservatives, artificial fragrances, artificial colors, harsh detergents or any other unhealthy toxins."); Exhibit 1, Declaration of Kim Richman submitted herewith ("Richman Decl.").

[4] *See* Richman Decl., Ex. 2.

Defendant's remaining arguments relating to Plaintiffs' allegations of injury and ability to plead unjust enrichment in the alternative have similarly been rejected by courts within and outside of this Circuit.

For all of the reasons given herein, Defendant's motion should be denied in its entirety.

ARGUMENT

I. LEGAL STANDARD.

In considering a motion to dismiss for failure to state a claim, courts "constru[e] the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *Chambers v. Time Warner, Inc*., 282 F.3d 147, 152 (2d Cir. 2002) (reversing dismissal of complaint). "When there are well-pleaded factual allegations in the complaint, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Goldemberg*, 8 F. Supp. 3d at 473 (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009)). To survive a motion to dismiss, a party need only plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The facts alleged in the Complaint render Plaintiffs' claims more than plausible, and, therefore, Unilever's motion to dismiss should be denied.

II. THE COMPLAINT ALLEGES SUFFICIENT FACTS TO RENDER PLAUSIBLE THE CLAIM THAT REASONABLE CONSUMERS ARE DECEIVED.

Plaintiffs bring statutory claims under the GBL § 349,[5] CLRA, UCL, and FAL. Each statute forbids the use of deceptive representations on consumer labels, and deceptiveness under each of these statutes is measured by the reasonable consumer standard. *See Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (holding that CLRA, UCL, and FAL claims are governed by the reasonable consumer standard and "prohibit not only advertising which is false, but also advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public"); *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 26 (1995) (holding that a practice is deceptive under GBL § 349 if it is "likely to mislead a reasonable consumer acting reasonably under the circumstances"). The Complaint more than adequately alleges facts demonstrating that Unilever's labeling of its "Naturals" Products is deceptive and misleading to reasonable consumers acting reasonably in the circumstances, causing Plaintiffs' financial injuries.

Defendant asks this Court to find, as a matter of law, that its representations regarding its "Naturals" Products were not deceptive, notwithstanding the fact that each of the Products are replete with unnatural, synthetic ingredients. Defendant also argues that the Products' so-called "value" prices and vibrant colors require a finding, as a matter of law, that no consumer could reasonably be deceived. (Def. Mem. at 16–18.) Plaintiffs, however, have plausibly alleged that the Product labels mislead reasonable consumers into believing the Products are natural by means of Unilever's prominent "Naturals" representations, as well as by means of the "Naturals" representations' context (*i.e.*, the natural-sounding product names, the scenic images of nature, and the "infused with" natural ingredients claims), which reinforces and amplifies the "Naturals" representations. Plaintiffs' claims raise issues of fact, and they are well-pled and plausible, which is the real question of law at issue. Defendant's motion to dismiss therefore fails.

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[5] Section 349 of the New York General Business Law prohibits "[d]eceptive acts and practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." N.Y. Gen. Bus. Law § 349(a); *Goldemberg*, 8 F. Supp. 3d. at 478. "The statute seeks to secure an 'honest market place' where 'trust,' and not deception, prevails." *Goshen v. Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314, 324, 774 N.E.2d 1190 (2002) (citation omitted). To state a claim pursuant to section 349, a plaintiff must allege that: (1) the defendant's deceptive acts were directed at consumers, (2) the acts are misleading in a material way, and (3) the plaintiff has been injured as a result. *Goldemberg*, 8 F. Supp. 3d. at 478 (collecting cases). Defendant has not challenged that its deceptive acts were directed at consumers.

A. Whether Defendant's "Naturals" Products Are Deceptively Labeled Because They Contain Mostly Artificial And Synthetic Ingredients Is A Question Of Fact That Cannot Be Resolved On A Motion To Dismiss.

Whether a particular act or practice is deceptive is an intensely factual issue that is not appropriately decided on a motion to dismiss, and courts routinely deny motions to dismiss even though defendants contend no reasonable consumer would be deceived. *See*, *e.g.*, *Ackerman v. The Coca-Cola Company*, No. 09-0395, 2010 WL 2925955, at *15 (E.D.N.Y. July 21, 2010) (denying motion to dismiss the plaintiffs' GBL § 349, UCL, FAL, and CLRA claims); *Williams*, 552 F.3d at 938–39 (reversing dismissal of class action against fruit juice manufacturer who misleadingly represented products as "fruit juice" with "all natural ingredients"); *Goldemberg*, 8 F. Supp. 3d at 478, 480 (collecting cases and holding that "the Court cannot hold as a matter of law that the product labels [Active Naturals] are not misleading to a reasonable consumer"); *Stephenson v. Neutrogena Corporation*, No. 12-0246, 2012 WL 8527784, at *1 (N.D. Cal. July 27, 2012) (denying under Federal Rule of Civil Procedure 9(b) motion to dismiss consumer protection claim that the use of the term "naturals" was deceptive).[6]

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[6] *See also Ault v. J.M. Smucker Co.*, No. 13-3409, 2014 WL 1998235, at *6 (S.D.N.Y. May 15, 2014) ("The question is whether a reasonable consumer would be misled by Crisco Oil's use of the 'All Natural' label . . . Ultimately, the question is one of reasonability, which cannot be

In response to the legion of cases that reject motions to dismiss similar claims, Defendant points out that some cases challenged the term "all natural" and/or "100% natural," as opposed to "naturals." But Defendant has no answer to *Goldemberg* and a string of cases opining on terms such as "naturals." *Goldemberg*, 8 F. Supp. 3d at 480 ("[T]he Court cannot hold as a matter of law that the product labels [Active Naturals] are not misleading to a reasonable consumer."). *Morales v. Unilever U.S., Inc.*, which involved a line of cosmetic products called "TRESemmé Naturals," (as well as Unilever) is directly on point. *Morales*, 2014 WL 1389613, at *7 ("The court therefore cannot conclude at this stage of the litigation that a reasonable consumer would not be misled by the term 'natural' or 'Naturals.'"); *see also Fagan v. Neutrogena Corp.*, No. 13-01316, 2014 WL 92255, at *2 (C.D. Cal. Jan. 8, 2014) (rejecting the defendant's argument "that the various formulations of the 'naturally sourced' language found on the product PDPs are not misleading as a matter of law").

Moreover, the court in *Jou v. Kimberly-Clark Corp.* rejected an argument virtually identical to Defendant's argument. *See Jou v. Kimberly-Clark Corp.*, No. 13-03075, 2013 WL

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resolved on Defendant's motion to dismiss." (internal citations omitted)); *In re Frito–Lay North America, Inc. All Natural Litigation*, No. 12-2413, 2013 WL 4647512, at *15 (E.D.N.Y. Aug. 29, 2013) ("[T]he question whether a reasonable consumer would likely be deceived by the designation 'All Natural' is a factual dispute.") (collecting cases); *Kosta v. Del Monte Corp.*, No. 12-01722, 2013 WL 2147413, at *12 (N.D. Cal. May 15, 2013) (holding it plausible that a reasonable consumer would rely on "'front of the package' labeling claims like 'fresh,' 'all natural,' . . . Indeed, it is plausible that such a consumer would pay a premium for products based on such appearances and representations."); *Brazil v. Dole Food Co., Inc.*, No. 12-01831, 2013 WL 1209955, at *14 (N.D. Cal. Mar. 25, 2013) ("The plausibility standard is not akin to a probability requirement. Moreover, whether a practice is 'deceptive, fraudulent, or unfair' is generally a question of fact that is not appropriate for resolution on the pleadings."); *In re Conagra Foods Inc.*, 908 F. Supp. 2d 1090 (C.D. Cal. 2012) (denying in part motion to dismiss similar claims of "100% all natural" cooking oil containing genetically modified organisms); *Astiana v. Ben & Jerry's Homemade, Inc.*, No. 10-4387, 2011 WL 2111796 at *3-4 (N.D. Cal. May 26, 2011) (denying motion to dismiss similar claims regarding "all natural" ice cream containing alkalized cocoa); *Henderson v. Gruma Corp.*, No. 10-04173, 2011 WL 1362188 at *11 (C.D. Cal. Apr. 11, 2011) (denying motion to dismiss similar claims regarding "all natural" bean dip containing *trans* fats).

6491158, at *6 (N.D. Cal. Dec. 10, 2013) ("Defendant appears to concede that if the phrase 'pure & natural' was modified to include the word 'only,' 'all,' or '100%' the consumer could plausibly be misled . . . The question accordingly becomes, why would the use of 'all pure & natural' state a claim but not just 'pure & natural'? . . . Whether one labels a product 'natural' or 'all natural,' the same plausible inference can be drawn -- that the product is natural, meaning it is not made with any non-natural ingredients. While the use of 'all' in 'all natural' may make the inference even more plausible than the inference arising from the use of just 'natural,' the use of 'natural' still provides the plausible inference required to defeat a Rule 12(b)(6) motion.").

There is no meaningful distinction between a label that represents a product is "all natural" and labels that proclaim that products are "naturals." Both representations convey to reasonable consumers that the products are natural, and both are deceptive when the products contain synthetic unnatural ingredients.

B. Plaintiffs Sufficiently Allege Deceptive Conduct.

Plaintiffs' allegations are more than sufficient to render plausible their claims that Defendant's prominent use of the term "Naturals" is misleading and deceptive. The Complaint alleges, *inter alia*:

- Defendant deceptively markets its Products with the label "Naturals" when, in fact, they contain primarily unnatural, synthetic ingredients (Compl. ¶¶ 1-20, 42-57);

- Defendant labels its Products as "Naturals," conveying to reasonable consumers that the products are, in fact, natural, when Defendant knows that a "natural" claim regarding cosmetics is a purchase motivator for consumers (Compl. ¶¶ 1-20, 42-57);

- Plaintiffs purchased Defendant's Products after viewing misleading statements on Defendant's Products labels that led them to believe the Products they were purchasing were natural, when they were not (Compl. ¶¶ 24-39, 53-59); and

- Plaintiffs paid more than they would have otherwise paid because of Defendant's misrepresentations. (Compl. ¶¶ 16-20, 24-39, 53-59, 85-86.)

Thus, Plaintiffs have alleged that Unilever's "Naturals" misrepresentations on the Product labeling misled Plaintiffs, like many other reasonable consumers, into believing that Unilever's Products were natural (and, as a result, paying a price premium for them), when the Products were filled with unnatural, synthetic ingredients. Such allegations are more than sufficient to plausibly establish deceptive conduct by Unilever. *See, e.g.*, *Goldemberg*, 8 F. Supp. 3d at 480; *Morales*, 2014 WL 1389613, at *7; *Fagan*, 2014 WL 92255, at *2.

Defendant's argument that reasonable consumers understand that cosmetic products are inherently synthetic because the FDA defines the term "cosmetic product" as used in the Code of Federal Regulations as referring to a product that is "manufacture[d]" (Def. Mem. at 13) is both improper for resolution on a motion to dismiss and simply untrue.[7] Plaintiffs adequately allege that they (and reasonable consumers) believed that the ingredients in the Products are natural. This belief is entirely reasonable, as cosmetic products that are genuinely all-natural are increasingly sold on the market today to satisfy consumer demand and growing expectation for all things natural. (*See* Richman Decl. at ¶¶ 4–7 and Exhibit 1 thereto.) But even assuming, *arguendo*, that Defendant is correct that cosmetics cannot be "natural" (which it is not), then the proper course would be for Defendant to abstain from falsely labeling its Products as "Naturals." It does not follow that, because cosmetics ostensibly *cannot* be "natural," Defendant may

[7] Indeed, a simple Google search reveals that numerous cosmetics contain no synthetic ingredients. *E.g.*, http://www.allnaturalcosmetics.com (advertising "the best cosmetics without synthetics"); http://www.100percentpure.com/pages/faq, http://www.allnaturalcosmetics.com (advertising "the best cosmetics without synthetics"); http://www.100percentpure.com/Articles.asp?ID=146 (stating "100% products are truly 100% Pure-no synthetic chemicals, chemical preservatives, artificial fragrances, artificial colors, harsh detergents or any other unhealthy toxins."). Plainly, Defendant's factual claim that all cosmetics inherently contain synthetic ingredients is not appropriately considered on this motion to dismiss.

represent that they *are* "natural" in complete disregard of the truth. This was the precise holding of the court in *Morales* against Unilever relating to its "TRESemmé Naturals" line of hair care products:

> Despite defendant's contention that a cosmetic product cannot be natural, numerous courts have denied motions to dismiss claims alleging that cosmetic products were falsely labeled as "natural". *See, e.g., Brown v. Hain Celestial Grp.*, 913 F.Supp.2d 881, 898 (N.D. Cal.2012) (denying motion to dismiss when defendant claimed that various cosmetic products were "pure, natural, and organic"); *Fagan v. Neutrogena Corp.*, Civ. No. 5:13–1316 SVV OP, 2014 WL 92255, at *2 (C.D. Cal. Jan.8, 2014) (denying motion to dismiss when defendant claimed that its sunscreen was "100% naturally sourced"). Even if defendant were correct that a cosmetic product cannot be "natural," it does not follow that labeling cosmetic products as natural is per se not misleading. Defendant's argument leads to the opposite conclusion—namely, that labeling cosmetic products manufactured from artificial ingredients as "natural" *is* misleading.

Morales, 2014 WL 1389613, at *7 (emphasis in original). Similarly, the court in *Ham v. Hain Celestial Group* held:

> Hain also contends that a reasonable consumer would expect some degree of processing, such as the addition of a leavening agent like SAPP, because the Waffles do not literally "roam in the wild or sprout naturally from trees." Mot. 8, 10. This argument, while entertaining, is not persuasive because it is plausible that a reasonable consumer would expect that an "All Natural" product contains only natural ingredients, not that the product itself comes from nature.

Ham v. Hain Celestial Grp., No. 14-2044, 2014 WL 4965959, at *3 (Oct. 3, 2014). Furthermore, as the court in *Astiana v. Dreyer's Grand Ice Cream, Inc.*, No. 11-2910, 2012 WL 2990766 (N.D. Cal. July 20, 2012) held, this type of argument is "problematic because, even though [an ingredient] is commonly used, that does not necessarily mean that a reasonable consumer would expect it to be used – *i.e.*, normally used does not necessarily imply normally expected; a reasonable consumer may not have the same knowledge as, *e.g.*, a commercial manufacturer." *Astiana*, 2012 WL 2990766, at *11.[8]

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[8] Defendant cites to the inapposite and roundly rejected cases of *Balser v. Hain Celestial Grp.*,

Moreover, in *Ackerman*, the court declined to rule, as a matter of law, that no reasonable consumer would be misled into believing that the beverage "vitamin water" contained only vitamins and water and that it was a "product that may help maintain healthy dietary practices." *Ackerman*, 2010 WL 2925955, at *15. The vitamin water ingredient list included ingredients other than vitamins and water and indicated the sugar content of the beverage. *Id.* at *16. Just as the court in *Ackerman* reasoned that the information contained on vitamin water's ingredients label, "though relevant, does not as a matter of law extinguish the possibility that reasonable consumers could be misled by vitamin water's labeling and marketing," this Court should not

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Inc., No. 13-05604, 2013 WL 6673617 (C.D. Cal. Dec. 18, 2013) and *Pelayo v. Nestle USA, Inc.*, No. 13-5213, 2013 WL 5764644 (C.D. Cal. Oct. 25, 2013). However, both *Balser* and *Pelayo* ignore the vast weight of authority and (to those courts) binding Ninth Circuit authority in *Williams v. Gerber Prods.*, 552 F.3d 934 (9th Cir. 2008)). Instead, both opinions rely on straw-man arguments. *See Pelayo,* 2013 WL 5764644, at *4 ("[T]he reasonable consumer is aware that Buitoni Pastas are not springing fully-formed from Ravioli trees and Tortellini bushes."); *Balser,* 2013 WL 6673617, at *1 (citing *Pelayo* and stating that "shampoos and lotions do not exist in nature, there are no shampoo trees"). The issue is not whether a finished cosmetic product "grows on trees," but whether Defendant has misrepresented the Products as "naturals." Accordingly, neither decision should be considered as persuasive authority in this Court. *See Bohac v. Gen. Mills, Inc.*, No. 12-05280, 2014 WL 1266848, at *7 (N.D. Cal. Mar. 26, 2014) (distinguishing *Pelayo*, reasoning that plaintiffs "offered definitions of 'natural' that are internally consistent and supported by applicable federal regulations and guidance"); *Rojas v. Gen. Mills, Inc.*, No. 12-05099, 2014 WL 1248017, at *6 (N.D. Cal. Mar. 26, 2014) (same); *Janney v. Mills*, No. 12-03919, 2014 WL 1266299, at *6 (N.D. Cal. Mar. 26, 2014) (same). Moreover, courts repeatedly reject *Pelayo* as an outlier that was wrongly decided. As one court put it, "no subsequent case has adopted *Pelayo*'s position, and two cases have affirmatively rejected it." *Garcia v. Kashi Co.*, No. 12-21678, 2014 WL 4392163, at *17 (S.D. Fla. Sept. 5, 2014); *see also Surzyn v. Diamond Foods, Inc.*, No. 14-0136, 2014 WL 2212216, at *3-4 (N.D. Cal. May 28, 2014) ("The Court concludes that *Pelayo* is not persuasive, and declines Defendant's invitation to follow it."); *Jou*, 2013 WL 6491158, at *8 (*Pelayo* "is at odds with basic logic, contradicts the FTC statement on which it relies, and appears in conflict with the holdings of many other courts, including the Ninth Circuit."); *Dorsey v. Rockhard Labs., LLC,* No. 13-07557, 2014 WL 4678969, at *6 (C.D. Cal. Sept. 19, 2014) ("The Ninth Circuit appears to have rejected the simplistic approach to representations that a product is 'all natural' suggested by Defendants' interpretation of *Pelayo.*"); *Ham*, 2014 WL 4965959, at *3 (recognizing disagreement with *Pelayo*).

conclude that the fact that the Products are cosmetics meets the heavy burden of "extinguish[ing] the possibility" that a reasonable consumer could be misled into believing the Products were "Naturals." *Id.*; *see also Fagan*, 2014 WL 92255, at *2 ("Defendant's argument that the representations are literally true because the term '100%' only applies to the ingredients in the products that provide protection from the sun (and not to other ingredients in the lotions that serve other purposes) rests on one possible interpretation of the language, but it is not the only possible interpretation.").

Defendant highlights the "naturalness" of its Products because it knows that such qualities induce consumers to purchase the Products, as alleged in the Complaint. (*See* Compl. ¶¶ 1-20, 42-57.) By arguing that the "Naturals" representations on its Products amount to nothing, Defendant implausibly attempts to convince the Court that it wastes resources and label space on irrelevant representations. While Defendant will later have the opportunity to demonstrate such an implausible reality, at this state of the proceedings, Defendant's argument is not sufficient to support dismissal of the more plausible argument that consumers are reasonably deceived by Defendant's emphasis on the naturalness of the Products. As such, Defendant's argument that Plaintiffs have failed to allege that the Products are deceptive is not well taken.

Defendant summarily declares that no reasonable consumer could have been misled by the claim "Naturals" because the containers list all of the synthetic ingredients "on the back label" and that it "is axiomatic that no reasonable consumer could be misled by a true statement." (Def. Mem. at 17-18.) However, it is well settled that small print and back-of-the-label disclosures do not insulate defendants from liability stemming from otherwise misleading affirmative statements, because reasonable consumers should not be expected to scour a label to be sure prominent representations are not false. *See, e.g.*, *Ackerman*, 2010 WL 2925955, at *16

("The fact that the actual sugar content of vitamin water was accurately stated in an FDA-mandated label on the product does not eliminate the possibility that reasonable consumers may be misled."); *Goldemberg*, 8 F. Supp. 3d at 479 ("Reasonable consumers should [not] be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box.").

The Ninth Circuit has squarely addressed this issue and rejected Defendant's argument:

> Reasonable consumers should [not] be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box. . . . We do not think that the FDA requires an ingredient list so that manufacturers can mislead consumers and then rely on the ingredient list to correct those misinterpretations and provide a shield for liability for the deception. Instead, reasonable consumers expect that the ingredient list contains more detailed information about the product that confirms other representations on the packaging.

Williams, 552 F.3d at 939-40; *accord Hughes v. Ester C Co.*, 930 F. Supp. 2d 439, 464 (E.D.N.Y. 2013) (same); *Lynch v. Tropicana Products, Inc.*, No. 11-07382, 2013 WL 2645050 (D.N.J. June 12, 2013) (same); *Henderson v. J.M. Smucker Co.*, No. 10-4524, 2011 WL 1050637 (C.D. Cal. Mar. 17, 2011) (same); *Colucci v. ZonePerfect Nutrition Co.*, No. 12-2907, 2012 WL 6737800 (N.D. Cal. Dec. 28, 2012) (same).[9]

Moreover, Defendant's argument that a literally true statement (which "Naturals" is not) cannot mislead a reasonable consumer has been repeatedly rejected. *See Goldemberg*, 8 F. Supp.

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[9] *See also Lam v. Gen. Mills, Inc.*, 859 F. Supp. 2d 1097, 1105 (N.D. Cal. 2012) ("Likewise, here, the Fruit Snacks' ingredients list cannot be used to correct the message that reasonable consumers may take from the rest of the packaging: that the Fruit Snacks are made with a particular type and quantity of fruit."); *Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1117, 1128 (C.D. Cal. 2010) ("[W]here product packaging contains an affirmative misrepresentation, the manufacturer cannot rely on the small-print nutritional label to contradict and cure that misrepresentation."); *Wilson v. Frito-Lay N. Am., Inc.*, No. 12-1586, 2013 WL 1320468 (N.D. Cal. Apr. 1, 2013) ("Even though the nutrition box could resolve any ambiguity, the Court cannot conclude as a matter of law, in the context of a Rule 12(b)(6) motion, that no reasonable consumer would be deceived by the 'Made with ALL NATURAL Ingredients' labels.").

3d at 479; *Stewart v. Smart Balance, Inc.*, No. 11-6174, 2012 WL 4168584, at *9 (D.N.J. June 26, 2012) ("[T]he fact that the labels were literally true does not mean that they cannot be misleading to the average consumer." (quoting *Smajla j v. Campbell Soup Co.*, 782 F. Supp. 2d 84, 98 (D.N.J. 2011))); *Primo v. Pac. Biosciences of Cal., Inc.*, 940 F. Supp. 2d 1105, 1116 (N.D. Cal. 2013) ("The Ninth Circuit has recognized that statements literally true on their face may nonetheless be misleading when considered in context."); *Donachy v. Playground Destination Props., Inc.*, No. 10-4038, 2013 WL 3793033, at *5 (D.N.J. July 19, 2013) ("'The fact that' a statement is 'literally true does not mean that' it 'cannot be misleading to the average consumer and actionable.'").[10]

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[10] The cases Defendant cites are readily distinguishable. In *Red v. Kraft Foods, Inc.*, No. 10-1028, 2012 WL 5504011 (C.D. Cal. Oct. 25, 2012), the plaintiff alleged that a label on a box of crackers that stated "made with real vegetables" was misleading because the crackers did not contain a "significant" enough amount of vegetable content. In rejecting the plaintiff's claims, the court concluded that "a reasonable consumer will be familiar with the fact of life that a cracker is not composed of primarily fresh vegetables." *Id.* at *4. But reasonable consumers could be misled by Defendant's labels because a reasonable consumer could conclude that shampoos and conditioners can be natural. *Hairston v. S. Beach Beverage Co., Inc.*, No. 12-1429, 2012 WL 1893818, at *4 (C.D. Cal. May 18, 2012) is inapposite, as the court there (incorrectly) held that the "natural" language was preempted, and thus the plaintiff's claim turned only on ambiguous references to fruit. *Rooney v. Cumberland Packing Corp.*, No. 12-0033, 2012 WL 1512106 (S.D. Cal. April 16, 2012) is inapposite because the brand name "Sugar in the Raw" would not make a reasonable consumer believe that the product is actually raw where the package expressly stated nine times the sugar was not raw. Other cases cited by Defendant involve unlikely claims that courts found are implausible on their face, unlike Plaintiffs' claims. *See Carrea v. Dreyer's Grand Ice Cream, Inc.*, No. 10-01044, 2011 WL 159380, at *6 (N.D. Cal. Jan. 10, 2011) ("[S]tatements that the Drumsticks products are 'Classic' or 'Original,' without specific claims about content or ingredients, are generalized statements that would not mislead a reasonable consumer into thinking that these ice cream products are wholesome or healthy."); *Stuart v. Cadbury Adams USA, LLC*, 458 F. App'x 689, 691 (9th Cir. 2011) ("Only an unreasonable consumer would be confused or deceived by Cadbury's failure to clarify that Trident White gum works only if consumers continue to brush and floss regularly."); *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995) ("The promotions expressly and repeatedly state the conditions which must be met in order to win. None of the qualifying language is hidden or unreadably small. The qualifying language appears immediately next to the representations it qualifies and no reasonable reader could ignore it."); *Sugawara v. Pepsico, Inc.*, No. 08-01335, 2009 WL 1439115, at *3 (E.D. Cal. May 21, 2009) ("This Court is not aware

Seeking once again to inject issues of fact, Defendant argues that the colors of certain shampoos are so "vibrant" that no consumer could think the Products are natural. (Def. Mem. at 15.) Not surprisingly, Defendant cites no authority or support for the claim that vibrant colors cannot be natural. Any traveler to the tropics (or anyone who has seen pictures of tropical flowers or fish) knows otherwise. Indeed, ubiquitous sellers of natural colorings would be disappointed to hear that the colors they offer are not vibrant.[11] Reasonable consumers expect that natural products might have natural color additives; whether Defendant's colors are not achievable in nature and whether an average consumer would know whether a vibrant color can be created with natural ingredients are questions of fact for the jury.

C. Plaintiffs Sufficiently Allege Actual Damages.

Defendant claims Plaintiffs' allegations are insufficient to allege damages. (Def. Mem. at 11-13.) Not true. The Complaint alleges Plaintiffs paid a price premium for Unilever's Products. (Compl. ¶¶ 16-20, 24-39, 53-59, 85-86.) This is sufficient to state a claim under New York's consumer protection law. *See, e.g.*, *Goldemberg*, 8 F. Supp. 3d at 481 ("[A] plaintiff may properly allege . . . the price of the product was inflated as a result of [the] defendant's deception.") (collecting cases); *Ackerman*, 2010 WL 2925955, at *23 ("Injury is adequately alleged under GBL §§ 349 or 350 by a claim that a plaintiff paid a premium for a product based on defendants' inaccurate representations."); *Guido v. L'Oreal, USA, Inc.*, 284 F.R.D. 468, 483 (C.D. Cal. 2012) (where consumers allege they paid a premium for a product based on marketing

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of, nor has Plaintiff alleged the existence of, any actual fruit referred to as a 'crunchberry' . . . a reasonable consumer would not be deceived into believing that the Product in the instant case contained a fruit that does not exist.").

[11] *See, e.g.*, http://www.colormaker.com/natural-ingredients.html (offering "natural color additives approved for use in food, cosmetic, and pharmaceutical products"); http://www.naturalcandystore.com/category/natural-food-colors (providing natural food colors made from vegetables).

representations, they have adequately alleged injury under New York consumer protection law).

Unilever argues, without citation to any authority, that the Complaint's well-pled allegations of a price premium fail as a matter of law. This argument flies in the face of the collection of cases cited in *Goldemberg*, 8 F. Supp. 3d at 481. *See also Ackerman*, 2010 WL 2925955, at *23; *Jernow v. Wendy's Int'l, Inc.*, No. 07-3971, 2007 WL 4116241, at *8 (S.D.N.Y. Nov. 15, 2007); *Lynch*, 2013 WL 2645050, at *7. Indeed, Judge Rakoff recently held that "[t]he deception is the false and misleading label, and the injury is the purchase price." *Ebin v. Kangadis Food Inc.*, No. 13-2311, 2013 WL 6504547, at *5 (S.D.N.Y. Dec. 11, 2013). Following Judge Rakoff in *Ebin*, Judge Ramos recently rejected a motion to dismiss where the plaintiffs simply pled that they purchased the defendant's milk product at a premium price. *See Koenig v. Boulder Brands, Inc.*, 995 F. Supp. 2d 274, 288 (S.D.N.Y. 2014) ("A plaintiff adequately alleges injury under GBL § 349 by claiming that he paid a premium for a product based on the allegedly misleading representations . . . Plaintiffs claim that, but for Defendant's 'unfair and deceptive practices,' they -- and the putative class -- would not have purchased, or paid a price premium for, Smart Balance . . . the Court finds that Plaintiffs have adequately alleged injury under GBL § 349." (citing, *inter alia*, *Ebin* for the proposition that "the injury is the purchase price")).

California law is the same. The recent decision in *Samet v. Procter & Gamble Co.*, No. 12-1891, 2013 WL 3124647 (N.D. Cal. June 18, 2013), is directly on point. There, the plaintiffs alleged that various products sold by the Kellogg Company, including Pringles-brand chips, were deceptively marketed as being healthy. The court rejected the defendant's argument that injury was insufficiently pled, holding:

> Plaintiffs spent money they otherwise would have saved but for defendants' acts of unfair competition. Courts in this district have overwhelmingly found that

> such allegations are sufficient to establish economic injury. Whether Plaintiffs actually did pay a premium price as a result of false and misleading labeling remains to be determined at a later stage in this litigation. As alleged, however, the injury of paying a higher price for a falsely advertised product is enough to show Plaintiffs suffered particularized harm to a legally protectable interest in the form of an economic loss.

Id. (citations omitted); *see also Chavez v. Blue Sky Natural Beverage Co.*, 340 F. App'x 359, 361 (9th Cir. 2009) (finding allegations sufficient for standing under California law that consumer lost money on product that had less value as a result of misrepresentations about the product).

Defendant's argument boils down to its statement that its Products are the cheapest on the market. (Def. Mem. 21-22.) However, Defendant's position relating to Plaintiffs' ability to prove damages is myopic, as the Court noted at the parties' pre-motion conference. Even assuming *arguendo* that the Product prices are the lowest prices on the market, Defendant may nonetheless have been able to charge a price premium as compared to if the Products had not been misrepresented as "Naturals." As the Court in *Goldemberg* observed, "a plaintiff may properly . . . claim[] that the price of the product was inflated as a result of [the] defendant's deception." *Goldemberg*, 8 F. Supp. 3d at 481 (citation and quotation omitted); *see also Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 329, 246 P.3d 877, 890 (2011) ("For each consumer who relies on the truth and accuracy of a label and is deceived by misrepresentations into making a purchase, the economic harm is the same: the consumer has purchased a product that he or she paid more for than he or she otherwise might have been willing to pay if the product had been labeled accurately. This economic harm -- the loss of real dollars from a consumer's pocket -- is the same whether or not a court might objectively view the products as functionally equivalent."). Plaintiffs, at the appropriate time, will show damages on a class-wide basis by showing that the class was charged more than they otherwise would have paid, on account of the claimed "Naturals" attribute. *See Brown v. Hain Celestial Grp., Inc.*, No. 11-03082, 2014 WL

6483216, at *18 (N.D. Cal. Nov. 18, 2014) (damages model "calculates the 'overcharge' or 'price premium' that consumers were charged for the claimed 'organic attribute' of the challenged Hain products"). It is not, nor has it ever been, the law that simply because a product is the cheapest on the market a manufacturer is free to deceive consumers with impunity, inducing them to purchase the misleadingly labeled product. Such a rule would be a clarion call to every unscrupulous huckster of cosmetics, food, or household products that New York and California are no longer champions of consumer rights but, rather, safe havens in which to market cheap products through outrageous marketing claims.[12]

III. PLAINTIFFS PLEAD RELIANCE FOR THEIR UCL AND CLRA CLAIMS.

Defendant misstates the record when it argues that Plaintiffs fail to allege that they actually relied on the mislabeling in purchasing the Products. (Def. Mem. at 20.) Not true. The Complaint states Plaintiffs' reliance on numerous occasions:

- "In deciding to purchase, and in purchasing, the Products, Ms. Paulino relied upon the representation that Suave Naturals were, in fact, 'NATURALS.'" (Compl. ¶ 27);
- "Had Ms. Paulino known at the time of purchase that the Products were not, in fact, "NATURALS" or natural, but instead contained predominantly unnatural, synthetic ingredients, she would not have purchased the Products. Ms. Paulino purchased, purchased more of, or paid more for, the Products than she would have had she known the truth that the Products were not 'NATURALS' or natural." (Compl. ¶ 28);

[12] Furthermore, Plaintiffs will be entitled to injunctive relief even if Defendant is ultimately successful in its defense to damages. *See Barkley v. United Homes, LLC*, 848 F. Supp. 2d 248, 273 (E.D.N.Y. 2012) *aff'd sub nom. as amended* (Jan. 30, 2014) *Barkley v. Olympia Mortgage Co.*, 557 F. App'x 22 (2d Cir. 2014) ("To obtain an injunction under G.B.L. § 349, plaintiffs need only show that the defendants engaged in 'deceptive acts or practices,' as defined under the statute."); *Chiste v. Hotels.com L.P.*, 756 F. Supp. 2d 382, 421 (S.D.N.Y. 2010) ("The complaint of plaintiff Lamattina is dismissed except for her first cause of action, for deceptive practices under G.B.L. § 349. If she prevails, she may be entitled to declaratory and injunctive relief."); *Kwikset*, 51 Cal. 4th at 336, 246 P.3d at 895 ("That a party may ultimately be unable to prove a right to damages (or, here, restitution) does not demonstrate that it lacks standing to argue for its entitlement to them," and "parties may seek an injunction under the UCL whether or not restitution is also available."). As such, because Defendant's "Naturals" label is plausibly deceptive, this case will continue regardless of Defendant's ill-fated damages argument.

- "In deciding to purchase, and in purchasing, the Products, Ms. Fanaika relied upon the representation that Suave Naturals were, in fact, 'NATURALS.'" (Compl. ¶ 35);

- "Had Ms. Fanaika known at the time of purchase that the Products were not, in fact, "NATURALS" or natural, but instead contained unnatural, synthetic ingredients, she would not have purchased the Products. Ms. Fanaika purchased, purchased more of, or paid more for, the Products than she would have had she known the truth that the Products were not 'NATURALS' or natural." (Compl ¶ 36);

- "Plaintiffs and the other members of the Class reasonably relied to their detriment on Defendant's false and misleading representations and omissions. Defendant's misleading affirmative statements that the Products are 'NATURALS,' as well as its other representations/imagery indicating the Products are natural, obscured the material facts that Defendant failed to disclose about the unnaturalness of its Products, including in particular the fact that the Products contain synthetic ingredients." (Compl. ¶ 51);

- "Consumers, including Ms. Fanaika and the California Sub-Class members, necessarily and reasonably relied on these materials concerning Defendant's Products." (Compl. ¶ 132).

Defendant argues that because Plaintiffs state elsewhere in the Complaint that they may in the future elect to purchase Defendant's Products should Defendant cease using its misleading labels, the Court should ignore the allegations set forth above. However, Defendant fails to explain how Plaintiffs' potential choice in the future to purchase a non-deceptively labeled Product impacts Plaintiffs' previous reliance on Defendant's deceptively labeled Product.[13]

IV. PLAINTIFFS ADEQUATELY ALLEGE A BREACH OF EXPRESS WARRANTY.

A *prima facie* claim for breach of express warranty requires the plaintiff to show that there was an affirmation of fact or promise by the seller, the tendency of which was to induce the buyer to purchase, and that the warranty was relied upon to the plaintiff's detriment.

[13] Moreover, removing the representation "Naturals" is not the only means to remedy the label's deceptiveness. Unilever could also formulate the Products so they are, in fact, "Naturals." Plaintiffs' allegation that they desire to purchase truly natural cosmetics in no way undercuts their allegations that they relied on Defendant's statements that the Products are "Naturals."

Goldemberg, 8 F. Supp. 3d at 482; *Vicuna v. Alexia Foods, Inc.*, No. 11-6119, 2012 WL 1497507, at *2 (N.D. Cal. Apr. 27, 2012) (holding that the plaintiffs adequately stated express warranty claim regarding "all natural" characterization of product containing allegedly synthetic ingredient). Under New York and California law, any affirmation of fact or promise made by the seller to the buyer, which relates to the goods and becomes part of the basis of the bargain, creates an express warranty. *Id.*

Plaintiffs have alleged Unilever promised the Products were "Naturals" when, in fact, they were not; that Plaintiffs relied on that promise in deciding to purchase the Products; and that the promise was false. This is a textbook case of breach of warranty. *See*, *e.g.*, *In re Bayer Corp. Combination Aspirin*, 701 F. Supp. 2d at 384; *Goldemberg,* 8 F. Supp. 3d at 482; *Ham*, 2014 WL 4965959, at *5 ("A food label can create an express warranty." (citing *Brown v. Hain Celestial Grp., Inc.*, 913 F. Supp. 2d 881, 900 (N.D. Cal. 2012) ("All Natural & Organic" cosmetic products))); *Vicuna,* 2012 WL 1497507, at *2 (N.D. Cal. Apr. 27, 2012) ("All Natural" label on potatoes was an express warranty).

As the Court recently held in *Ault v. J.M. Smucker Co.*, No. 13-3409, 2014 WL 1998235 (S.D.N.Y. May 15, 2014), "Defendant's labeling . . . as 'All Natural' is an actionable warranty." *Ault*, 2014 WL 1998235, at *6; *see also Parker v. J.M. Smucker Co.*, No. C 13-0690 SC, 2013 WL 4516156, at *6 (N.D. Cal. Aug. 23, 2013) (applying California law, holding that "'All Natural' is an affirmative claim about a product's qualities, and it does not amount to mere puffery because it is not outrageous and generalized"); *Elias v. Ungar's Food Products, Inc.*, 252 F.R.D. 233, 251 (D.N.J. 2008) (certifying warranty claim based on food package's statements relating to fat content). It is settled that the phrase "all natural" creates an express warranty because it represents to consumers that the product is natural and not synthetic. Defendant here represents its Products as "Naturals," which a reasonable consumer would understand as warrantying that the Products are, in fact, natural, not filled with unnatural, synthetic ingredients. Accordingly, Plaintiffs have stated a claim for breach of an express warranty.[14]

Defendant's argument relating to notice is equally unavailing. The pre-litigation notice requirement does not apply to consumers as against remote manufacturers. In *Cipollone v. Liggett Group, Inc.*, 683 F. Supp. 1487, 1497-98 (D.N.J. 1988), the court rejected the claim that, under the UCC, a consumer must provide pre-litigation notice to a remote manufacturer pursuant to N.J.S.A. § 12A:2-607(3)(a). *See also Coyle v. Hornell Brewing Co.*, No. 08-2797, 2010 WL 2539386, *6 (D.N.J. June 15, 2010) ("[T]his Court has predicted more than once that the New Jersey Supreme Court would not require a buyer to give notice of breach of warranty to a remote manufacturer who is not the immediate seller under Section 2-607 before commencing suit"); *cf. Silverstein v. R.H. Macy & Co.*, 266 A.D. 5, 9, 40 N.Y.S.2d 916, 920 (App. Div. 1943).

The Supreme Court of California explained the reason for treating the notice provision differently in the case of a remote seller: "[I]t becomes a booby-trap for the unwary. The injured consumer is seldom 'steeped in the business practice which justifies the rule,' . . . and at least

[14] The cases Defendant cites are inapposite. Indeed, the court in *Koenig* held that information on the ingredients label does not preclude a contrary warranty based on the label: "At this juncture, viewing the allegations in the light most favorable to Plaintiffs, the Court cannot conclude that Defendants' disclosure of the Smart Balance fat content negated the alleged promise created by the words 'fat free,' and will not dismiss the claim on this basis." *Id.*, 995 F. Supp. 2d at 290. In *Ackerman*, 2010 WL 2925955, at *24, the plaintiff asserted a warranty claim based on the promise that a drink would be "beneficial," but the label never used that word. Here, Plaintiffs allege that Defendant warrantied that the Products are "Naturals" because that is what the label actually says, and they allege that Defendant breached that warranty by providing Products that are not "Naturals" but are instead filled with chemicals. *Chin v. Gen. Mills, Inc.*, No. 12-2150, 2013 WL 2420455 (D. Minn. June 3, 2013) is unpersuasive as it was, respectfully, wrongly decided. That decision turned on the assumption that disclosures on an ingredients list can cure otherwise false representations on the front of the package. *Id.* at *7. But that view was rejected in *Ackerman*, *Koenig*, and *Goldemberg*, 8 F. Supp. 3d at 479 ("Reasonable consumers should [not] be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box.").

until he has had legal advice it will not occur to him to give notice to one with whom he has had no dealings.'" *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 62, 377 P.2d 897, 900 (1963); *see also In re HP Inkjet Printer Litig.*, No. 05-3580, 2006 WL 563048, at *5 (N.D. Cal. Mar. 7, 2006) (citing *Greenman*).

Ace American Insurance Co. v. Fountain Powerboats, Inc., No. 06-66, 2007 WL 2438338 (D.N.H. Aug. 24, 2007) is also on point. In *Ace American Ins. Co.*, the court interpreted Section 2-607(3)(a) of New Hampshire's Uniform Commercial Code. This provision is identical to the New York section at issue here. There, a manufacturer of a power boat asked for summary judgment because the plaintiff did not give notice to the manufacturer before filing suit. The New Hampshire court held notice to a manufacturer is not required. *Id.*

Likewise, in *Cooley v. Big Horn Harvestore Sys., Inc.*, 813 P.2d 736, 741 (Colo. 1991) the court addressed this identical U.C.C. provision. The Court ruled:

> The language of section 4-2-607(3)(a) is unambiguous: it requires a buyer to give notice of a defective product only to the "seller." See 2 Anderson, Uniform Commercial Code § 2.607:24. ***The General Assembly has not elected to require advance notice to a manufacturer of litigation for breach of the manufacturer's warranty of a product***, and we find no compelling reason to create such a condition precedent judicially in the context of commercial litigation.
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> * * *
>
> In view of the unambiguous language of section 4-2-607(3)(a), we conclude that a purchaser injured by a product is not required to give notice of such injury to a remote manufacturer prior to initiating litigation against such manufacturer.

813 P.2d at 741, 742 (emphasis added).

As the language of N.Y. U.C.C. § 2-607(3)(a) is identical to the above referenced state U.C.C.s, a similar result should follow here. *See Ebin*, No. 13-2311, 2014 WL 737878, at *2 (holding under New Jersey's verbatim law that a plaintiff "need not give notice of the breach against a manufacturer who was not the immediate seller of the product.”).[15]

Moreover, “the latest version of New York Pattern Jury Instructions, presumably applicable when this case goes to trial, recognizes the exception to the N.Y.-U.C.C. notice provision that is carved out.” *See In re Hydroxycut Mktg. & Sales Practices Litig.*, No. 09-2509, 2010 WL 1734948, at *3 (S.D. Cal. Apr. 26, 2010). New York Pattern Jury Instructions state: “Notice of breach of warranty to the seller within a reasonable time after the buyer knew, or ought to have known, of the breach . . . was held inapplicable to . . . to an action by a remote purchaser against a manufacturer.” N.Y. Pattern Jury Instr.--Civil 2:140 (citing *Greenman*, 59 Cal 2d 57). As such, notice to Unilever was not required.

In any event, Plaintiffs did notify Defendant of their claims. Not only was Defendant supplied with a CLRA Notice on behalf of Plaintiff Fanaika (Richman Decl., Ex. 2), Defendant was also supplied with a draft complaint in substantially the same form as the one that Plaintiffs ultimately filed. (*Id.*) In addition, attorneys for the parties had discussions about the case for months prior to filing. (Richman Decl., ¶ 10.) Such notice is more than sufficient, if notice is required at all. *See Atronic Int'l, GmbH v. SAI Semispecialists of Am., Inc.*, No. 03-4892, 2006 WL 2654827, at *9 (E.D.N.Y. Sept. 15, 2006) ("The notification need only alert the seller that the transaction is troublesome"); *Medinol Ltd. v. Boston Sci. Corp.*, 346 F. Supp. 2d 575, 620 (S.D.N.Y. 2004) ("Notice need not be expressed in any magical formula such as a lawyer's letter."); *CWF Hamilton & Co. v. Schaefer Grp., Inc.*, No. 10-339, 2012 WL 1106672, at *4 (S.D. Ohio Apr. 2, 2012) ("A buyer need not employ any magic words or a specific statement to preserve its claim for breach of an express warranty.").

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[15] This is the holding in the vast majority of states that have addressed this issue interpreting either identical or nearly identical sections of their own state U.C.C. *See Firestone Tire & Rubber Co. v. Cannon,* 53 Md.App. 106, 452 A.2d 192, 197 (1982) (finding “seller” in 2-607 means only the immediate seller the court held “it is not difficult to imagine the injustice that would be caused to consumers from requiring notice to each person in the chain”); *Carson v. Chevron Chem. Co.*, 6 Kan. App. 2d 776, 785, 635 P.2d 1248, 1256 (1981) (“It is the finding of this court that in the ordinary buyer-seller relationship, K.S.A. 84-2-607(3)(a) requires that notice of an alleged breach need be made only to the buyer’s immediate seller.”); *Wright v. Brooke Group Ltd.*, 114 F. Supp. 2d 797 (N.D. Iowa 2000); *Owens v. Glendale Optical Co.,* 590 F. Supp. 32, 36 (S.D. Ill. 1984) (“Illinois law holds that notification of a breach need only be given to the immediate seller”); *Church of the Nativity v. Watpro, Inc.*, 474 N.W.2d 605, 609-610 (Minn. App. 1991) (notice need go only to immediate seller and not to others in distribution chain); *Ragland Mills, Inc. v. General Motors Corp.*, 763 S.W.2d 357 (Mo. App. 1989) (in general, buyer required to give notice of breach of warranty only to immediate seller); *Tomczuk v. Town of Cheshire*, 26 Conn. Supp. 219, 222 (1965) (seller in section 2-607 “obviously refers to the person who made the immediate sale”); *Shooshanian v. Wagner*, 672 P.2d 455, 463 (Alaska 1983) (filing of complaint constitutes notice to manufacturer, in that “[a] consumer unfamiliar with commercial practices should not be barred from pursuing a meritorious claim because he was unaware of the need to notify a remote seller of breach before bringing suit”).

Indeed, the filing of the Complaint in this action constitutes adequate notice. As the court held in *In re Ford Motor Co. E-350 Van Products Liab. Litig.* No. 03-4558, 2010 WL 2813788, at *72 (D.N.J. July 9, 2010), "this Court agrees that under New York law, the filing of a complaint could constitute sufficient notice." *Id.* (citing *Panda Capital Corp. v. Kopo Int'l, Inc.,* 242 A.D.2d 690, 662 N.Y.S.2d 584, 586 (App. Div. 1997) ("This argument overlooks the fact that the complaint and subsequent amended complaint in this action themselves constituted such notice "); *Silverstein,* 266 A.D. 5, 40 N.Y.S.2d 916, 920 (App. Div. 1943) ("[T]he commencement of this action would seem to afford sufficient notice of breach of warranty.").[16]

The policies underlying the notice requirement are best served by finding that notice to Defendant was not required or that Defendant was on notice. *See* N.Y. U.C.C. Law § 2-607 comment 4 ("[T]he rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy."); *see also In re Bridgestone/Firestone Inc. v. Wilderness Tires Prods. Liab. Litig*., 155 F. Supp. 2d 1069, 1109 (S.D. Ind. 2001) (Section 2-607(3)(a)'s pre-suit notice requirement is not served in cases, like this one, "where Defendants had ample notice of the defect in the products well before the lawsuit was filed, and, indeed, allegedly well before Plaintiffs themselves did, and chose not to remedy those defects, no purpose would be served by requiring pre-litigation notice.").[17]

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[16] *See also Elias*, 252 F.R.D. at 251 ("[P]laintiffs need not give notice of the breach against a manufacturer who was not the immediate seller of the product, and, in any event, a civil complaint would satisfy any such notice requirement under N.J.S.A. 2-607(3)(a)."); *Strzakowlski v. Gen'l Motors Corp.*, No. 04-4740, 2005 WL 2001912, *3 (D.N.J. Aug. 16, 2005) ("[E]ven if notice to [Defendant] is necessary under section 2-607(3)(a), the filing of Plaintiffs' Complaint satisfied this requirement"); *Brown v. Abbott Labs., Inc.*, No. 10-6674, 2011 WL 4496154, at *6 (N.D. Ill. Sept. 27, 2011) (holding that "'notice-by-lawsuit' is appropriate").

V. PLAINTIFFS' UNJUST ENRICHMENT CLAIM IS SUFFICIENTLY PLED.

To prevail on a claim for unjust enrichment in New York, a plaintiff need only plead that (1) the defendant was enriched; (2) the enrichment was at the plaintiff's expense; and (3) the circumstances were such that equity and good conscience require the defendant to make restitution. *See Hughes*, 930 F. Supp. 2d at 472. The Complaint easily establishes these elements by alleging (1) that Unilever was enriched at the expense of Plaintiffs and other victims of Unilever's deception; (2) when Plaintiffs and the other putative class members purchased the falsely labeled Products; and (3) that Unilever profited by falsely promising the Products were "Naturals" when they were not, thereby inducing Plaintiffs and others into buying the Products at a premium. Thus, Plaintiffs have stated a claim for unjust enrichment.

Unilever does not argue otherwise, arguing only that Plaintiffs' unjust enrichment claim is duplicative and as such must be dismissed. But Plaintiffs are entitled, under Rule 8(d), to plead unjust enrichment as an alternative theory of liability. *See St. John's Univ., New York v. Bolton*, 757 F. Supp. 2d 144, 183-84 (E.D.N.Y. 2010). Moreover, as the court held in *In re Bayer Corp. Combination Aspirin*, sustaining a claim for unjust enrichment:

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[17] Furthermore, as the Court in *Panda* held, whether notice was given within a reasonable time constitutes a question of fact. *See Panda Capital*, 662 N.Y.S.2d at 587.

> [P]laintiffs charge defendant with employing misleading statements about the virtues of the combination product to market them to consumers. Because of these misrepresentations, plaintiffs purchased the combination products and defendant retained those benefits. If the allegations in the Complaint are true, then defendant reaped a financial reward at plaintiffs' expense. This is sufficient to state a claim for unjust enrichment

701 F. Supp. 2d at 384; *see also Ackerman*, 2010 WL 2925955, at *26; *Hughes*, 930 F. Supp. 2d at 472. Therefore, Plaintiffs may recover for more than just the premium paid under a theory of unjust enrichment, and, as such, the claim is not duplicative. In addition, the statute of limitations period for an unjust enrichment claim is longer than for a GBL section 349 claim. *See*, *e.g.*, *Ferring B.V. v. Allergan, Inc.*, 932 F. Supp. 2d 493 (S.D.N.Y. 2013) ("The limitations period for unjust enrichment claims is six years."). Thus, if Unilever's conduct was and is misleading and deceptive, the unjust enrichment claim is not duplicative, as it allows for alternative relief as compared to GBL section 349.[18]

CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss should be denied.[19]

Dated: January 9, 2014
White Plains, New York

FINKELSTEIN, BLANKINSHIP,
FREI-PEARSON & GARBER, LLP

/s/Todd S. Garber
Todd S. Garber

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[18] Defendant asks this Court to strike Plaintiffs' nationwide class actions at the motion to dismiss stage. Courts routinely hold that issues such as this are better determined at class certification. *Chen-Oster v. Goldman, Sachs & Co.*, 877 F. Supp. 2d 113, 117 (S.D.N.Y. 2012) (denying motion to strike class allegations where "all of the defendants' arguments are indistinguishable from the issues that would be decided in the context of a motion for class certification"); *see also Sharma v. BMW of N. Am., LLC*, No. 13-2274, 2015 WL 82534 (N.D. Cal. Jan. 6, 2015) (denying motion to strike class allegations at the pleading stage).

[19] Plaintiff respectfully requests leave to amend should the Court dismiss any part of the Complaint, with such leave freely granted in this Circuit. *See* Fed. R. Civ. P. 15(a); *AEP Energy Servs. Gas Holding Co. v. Bank of Am., N.A.*, 626 F.3d 699, 725 (2d Cir. 2010).

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